82-1139

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

FORD MOTOR COMPANY, a Corporation,

Petitioner,

vs.

JAMES M. HASSON, a Minor, by and through his Guardian *ad Litem* JACK M. HASSON, and JACK M. HASSON, Individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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Question Presented.

Whether, in a state which elects to provide a jury as trier of fact, a litigant is denied due process by jurors who secretly read a novel and work crossword puzzles over an extended period during the taking of evidence?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INTRODUCTION.

The petitioner Ford Motor Company ("Ford") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California rendered on September 16, 1982.

OPINION BELOW.

The opinion of the Supreme Court of California is officially reported in 32 Cal.3d 388 (September 16, 1982) and it is printed in the Appendix hereto, *infra* pp.1-41.

JURISDICTION.

The judgment of the Supreme Court of California was entered on September 16, 1982. Ford's timely Petition for Rehearing was filed on October 1, 1982, and denied by the

California Supreme Court on November 15, 1982. This Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourteenth Amendment (Section 1) to the Constitution of the United States provides in pertinent part: ". . . .; nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE.

Factual Background.

This Petition questions the fundamental fairness of a determination that validates verdicts rendered by jurors who were guilty of clear misconduct in a state civil jury trial involving a tragically injured plaintiff and a large corporate defendant. The trial was long and involved numerous witnesses, complex technical issues and a great deal of conflicting testimony.

Following their return of an astounding $11,500,000 award to plaintiffs, Ford learned that 5 of the 12 assigned jurors had cared so little about their responsibilities that they had abandoned all but the pretense of discharging them. Concealed from the view of counsel by the jury box, they indulged in private amusements — reading a novel and solving crossword puzzles — for an extended period of days or weeks while witnesses and evidence were being presented. These facts were first disclosed to the trial participants during juror interviews immediately following the verdict.

Ford's ability to prove the fact of this misconduct was severely restricted. In California, there is no right to compel

juror testimony after trial: any showing in this regard must be made by affidavits provided by jurors voluntarily. Cal. Code Civ. Proc. § 658; *Linhart v. Nelson*, 18 Cal.3d 641, 643-45, 134 Cal.Rptr. 813 (1976). In addition, the type of evidence which may be presented is further restricted by Evidence Code section 1150, which provides in relevant part:

> "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Cal. Evid. Code § 1150 (Deering 1966).

Under the circumstances, Ford took the only available step. It filed declarations provided to its counsel by three jurors willing to bring to light the misconduct they had objectively perceived. Of these jurors, one — Mrs. A — had voted for plaintiffs on all issues; another — Mr. W — had voted for the defense; the third — Mrs. G — had been excused because of a family illness shortly before the conclusion of trial and had not voted at all. Their declarations described intentional acts of misconduct by jurors D, L, G-1, G-2 and V.

Mrs. A declared:

> "During the course of trial, over approximately a one-month period, juror [D] was reading the book *A Night in Byzantium* in the jury box while witnesses and evidence were being presented.
>
> "Jurors [L, G-1 and V] over a period of several weeks during the trial were doing crossword puzzles

in the jury box while witnesses and evidence were being presented." (C.T. 3198.)*

Mrs. G declared:

"During the course of trial I observed that [L], in the jury box, had opened written material or material with figures not having to do with the trial, which she was working on or doing something with while testimony and evidence were being presented.

"On many occasions during the trial I saw juror [D] reading a book in the jury box while evidence and witnesses were being presented." (C.T. 4303.)

Mr. W declared:

"During the course of trial I saw jurors [L, G-2 and V] doing crossword puzzles in the jury box while witnesses and evidence were being presented.

"I observed that juror [D] while sitting in the jury box during court sessions was reading a book. Her reading continued intermittently over a period of many days." (C.T. 3205.)

Plaintiffs' counsel were successful in obtaining counter affidavits from every juror and alternate; but none denied the occurrence of the above-described misconduct or even denied seeing it. The forewoman of the jury, G-2, simply ignored the charges altogether: the remaining four accused jurors — L, D, G-1 and V — filed declarations containing an identical formula paragraph:

"I specifically deny . . . that I was reading extraneous material or doing crossword puzzles in any manner or *to any extent, whereby I was not able to pay close attention to the testimony* . . ." (C.T. 630, 640, 649, 654. Emphasis added.)

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*References will be herein made to pages in the Clerk's Transcript using the preface "C.T."

In short, those jurors who chose to respond to the serious charges did not deny the misconduct occurred. They simply offered a highly dubious and, under Evidence Code § 1150, patently inadmissible rationalization about its effect.

Ford presented its juror declarations along with numerous other arguments in support of a Motion for New Trial. Plaintiffs presented their juror affidavits and arguments in opposition. As noted by the California Supreme Court, the trial court erroneously failed to disregard the plaintiffs' jurors' inadmissible disclaimers* and denied Ford's Motion except as it related to the excessiveness of the jury's $7,500,000 compensatory damages award which it ordered reduced by $1,650,000. Ford appealed.

Following submission of briefs and oral arguments, a unanimous Court of Appeal agreed with Ford's contentions that the above-described misconduct both occurred and was prejudicial. As the Court noted:

> "A crossword-puzzle working juror attempting to ascertain the proper word has a closed mind, or at minimum, an interrupted attention span. Similarly a novel-reading juror cannot concentrate on both the flow of the plot and the flow of the testimony. Such inattention implies prejudgment of the case, which is misconduct.
>
> "Nothing admissible appears in the record herein to rebut the presumption of prejudice which arises from such juror misconduct. The inescapable conclusion is that the parties did not have twelve unbiased, impartial jurors.
>
> "The judgment and new trial order both must be reversed for a new trial on all issues by an unbiased jury." Appendix, p. 51.

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*Appendix, pp. 25-26.

Plaintiffs submitted a Petition for Hearing to the California Supreme Court.

The State Supreme Court granted plaintiffs' Petition and, following hearing of oral arguments, issued its opinion which, by a 6-1 majority, reinstated the verdict of the trial court in its entirety. On the subject of juror misconduct, the majority opinion declares:

(a) "That Ford has made a prima facie showing of improper conduct by certain jurors" — the novel reader and the crossword puzzle solvers. Appendix, p. 22.

(b) That the plaintiffs' counter-declarations concerning these matters were inadmissible "and should not have been considered by the trial court on ruling on the motion for a new trial." *Id.*, pp. 25-26 (footnote omitted).

(c) That: "The allegations contained in Ford's declarations therefore remain unrebutted. It must be concluded that by failing to fulfill their duty of attentiveness, the jurors committed misconduct." *Id.*, p. 26. And,

(d) That a civil litigant, such as Ford, is entitled to the benefit of California's well-established presumption that " 'prejudice arises from *any* juror misconduct.' " *Id.*, pp. 27-28 (quoting from *People v. Honeycutt*, 20 Cal.3d 150, 156, 141 Cal.Rptr. 698 [1977] [emphasis added]).*

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*In so holding, the California Supreme Court notes that a presumption of prejudice became a part of California law because the evidentiary limitations nposed by section 1150 seriously impair an aggrieved litigant's ability to prove prejudice:

> "The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict *or which deprived the complaining party of a thorough consideration of his case*, yet who are unable to establish by preponderance of the evidence that actual prejudice occurred. The law thus recognizes the substantial barrier to proof of prejudice which Evidence Code section 1150 erects, and it seeks to lower that barrier somewhat." Appendix, pp. 27-28 (emphasis added).

Having concluded that unrebutted presumptively prejudicial juror misconduct occurred in this case, the majority then makes an abrupt departure from logic and precedent by, in the words of dissenting Justice Richardson, "purporting to rebut the *presumption* because defendant has failed to show *actual* prejudice!" Appendix, p. 37 (emphasis in original). In so holding, the majority of the California Supreme Court has deprived Ford of its due process right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution.

The Federal Question Was Timely and Properly Raised so as to Give the Supreme Court Jurisdiction.

In its Motion for New Trial and in its briefs on Appeal, Ford challenged the propriety of considering the subjective disclaimers offered by plaintiffs' jurors. The constitutional issues presented by this petition arose for the first time when the California Supreme Court published its opinion which concedes that plaintiffs' juror declarations should not have been considered. Acknowledging that Ford *proved* the existence of presumptively prejudicial juror misconduct, the California Supreme Court then took the *unprecedented* step of holding that this misconduct, the scope and effects of which neither the defendant nor the court could possibly measure, was harmless. To achieve this result, the California Supreme Court did not decide that Ford's evidence was insubstantial. Instead, it assumed the role of a trier-of-fact and decided on review of the bare record of a closely contested trial that the *liability* evidence against Ford was, in its word, "overwhelming."* It went on to declare, in direct opposition to its earlier recognition of the need for

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*Appendix, p. 29. As noted by the dissent, this finding expressly fails to meet Ford's contentions as to the "*damages* aspect of the case." *Id.*, p. 38, J. Richardson dissenting.

a presumption of prejudice to temper the restrictions of Evidence Code § 1150,* that Ford must lose because it had failed to prove *actual* prejudice. In so holding, the California Supreme Court has deprived Ford of "a fair trial in a fair tribunal"** and has thus denied Ford its rights under the Due Process Clause of the Fourteenth Amendment.

These points were raised with appropriate citation to federal constitutional authority in a Petition for Rehearing filed by Ford on October 1, 1982. On November 15, a majority of the Court, Justice Richardson dissenting, summarily denied Ford's petition without comment. This Petition for Certiorari is being timely filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

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*See footnote at p. 6, *supra*.

***Irwin v. Dowd*, 366 U.S. 717, 722 (1971).

ARGUMENT FOR GRANTING THE WRIT.

It was plainly proved that during the trial of this case, five of the twelve jurors for an extended period of days or weeks secretly tuned out some or all of the proceedings in favor of indulging in private amusements — reading a novel and solving crossword puzzles. All five, three of whose votes were necessary to the verdict, joined in voting in favor of liability and returning a $7.5 million compensatory damages award which the California Supreme Court as well as the trial court determined to be excessive. Four of them, *all* of whose votes were necessary to the verdict, joined in the bare 9-3 majority which returned a $4,000,000 punitive damage award.

In its opinion upholding the verdicts, the California Supreme Court repeatedly alludes to the evidence supporting plaintiffs' case; but in each example the testimony upon which the Court relies was not such that all reasonable men would be bound to reach the same conclusion. Substantial evidence to the contrary was presented by Ford which if heard and understood could have resulted in a sustainable defense verdict. No one at this stage can say what weight an attentive jury might have given to that evidence. Accordingly, it is impossible to gauge the extent to which the misconduct affected the jury's finding on any issue, however critical to the outcome.

Citing both California Constitution Article I, section 16* and the Seventh Amendment to the United States Consti-

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*Article I, section 16 of the California Constitution provides, in pertinent part:

> "Trial by jury is an inviolate right and shall be secured to all, but in a civil case three-fourths of the jury may render a verdict. . . ."
>
> "In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. . . ." Cal. Const. art. I, § 16.

tution, the California Supreme Court admits that "civil litigants, like criminal defendants, have a constitutionally protected right to the complete consideration of their case by an impartial panel of jurors". (Appendix, p. 28.) Citing the same provisions as well as the Sixth Amendment, the Court concedes:

> "The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations. . . . Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled." *Id.*, p. 21.

Yet, in the present case, the Court holds that a litigant may be deprived of such fundamental constitutional rights whenever a reviewing court, having weighed the evidence in a bare written record, feels strongly that the result below was correct. Moreover, as noted by the dissenting justice, the majority indicates that it is its review of the *liability* evidence alone that is determinative, regardless of how strong the losing party's evidence may have been on the subject of *damage*. *Id.*, p. 38, Richardson, J., dissenting.

Our case involved *five* jurors, including the forewoman, who deliberately chose not to do their duty. The intentional abridgment, on this scale, of so elemental a right is totally unprecedented in American jurisprudence. In every respect, the California Court's decision represents a shocking departure from precedent and plainly deprives Ford of constitutional rights afforded it by the Due Process Clause of the Fourteenth Amendment.

Due Process Requires That if a State Elects to Provide Jury Trial in Civil Actions, It Must Be Comprised of Jurors Who Are Willing and Able to Give Full Consideration to the Evidence Presented by Both Sides.

In considering the issue of juror misconduct in the context of a state criminal trial, this Court recently declared:

> "Due process means a jury *capable* and *willing* to decide the case solely on the evidence before it. . . ." *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (emphasis added).

In the instant matter, five jurors were demonstrably *unwilling* to give their undivided attention to the evidence. It is also clear that the activities they elected to indulge in — reading and solving crossword puzzles — are ones which by their very nature rendered these jurors *incapable* to properly receive the evidence presented.

The ability of jurors to comprehend the evidence presented in a complex trial was found to be an essential element of due process by the Third Circuit Court of Appeals in *In re Japanese Electronic Products Antitrust Lit.*, 631 F.2d 1069 (3rd Cir. 1980) (hereafter "*Electronic Products*"). Speaking for the majority, Chief Judge Seitz observed:

> "The primary value promoted by due process in fact finding procedures is 'to minimize the risk of erroneous decisions.' [Citations.] A jury that cannot understand the evidence and the legal rules to be applied provides no reliable safeguard against erroneous decisions. . . . Moreover, in the context of a completely adversary proceeding, like a civil trial, due process requires that 'the decision-maker's conclusion . . . rest solely on the legal rules and evidence adduced at the hearing.' *Goldburg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011,

1022, 25 L.Ed.2d 287 (1970). Unless the jury can understand the legal rules and evidence, we cannot realistically expect that the jury will rest its decision on them." *Id.* at 1084.

As Chief Judge Seitz concluded:

> "Our liberties are more secure when judicial decision makers proceed rationally, consistently with the law, and on the basis of evidence produced at trial. If the jury is unable to function in this manner, it has the capacity of becoming itself a tool of arbitrary and erratic judicial power." *Electronic Products, supra,* 631 F.2d at 1085.

The jurors with which we deal here had no known lack of capacity to understand. Rather they took deliberate action to engage in other mental activities which diverted their attention from the evidence being presented. Nowhere in the California Supreme Court's opinion is the suggestion made that even the most gifted of jurors could simultaneously read or solve crossword puzzles and duly weigh the evidence presented by both sides.

Due Process Requires That the Jurors Not Be Distracted From Their Responsibilities.

In *Estes v. Texas,* 381 U.S. 532 (1965), *rehearing denied,* 382 U.S. 875 (1965), this Court decided that televising trial proceedings, under the then novel and cumbersome state of the art, denied the defendant his right to a fair trial provided by the Due Process Clause. A particular concern expressed by the Court was the presence of the TV camera as a potential cause of juror inattention:

> "[W]hile it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury 'distraction.' . . . Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind

> will be preoccupied with the telecasting rather than with the testimony." *Id.* at 546.

In a lengthy concurring opinion, Chief Justice Warren commented on the prejudice inherent in jurors being distracted. He concluded that the presence of television in the courtroom could have the effect of preventing the trial participants "from giving their full attention to their proper functions at trial. . . . To the extent that television has such an inevitable impact it undercuts the reliability of the trial process." *Id.* at 570.

In *Citron v. Aro Corporation*, 377 F.2d 750 (3rd Cir. 1967), *cert. denied sub nom., Aro Corporation v. Citron*, 389 U.S. 973 (1967), the Court found that plaintiff's due process rights were violated by the trial court's imposition of several lengthy recesses during which the jurors *might* have forgotten some of his evidence. The Court declared:

> "The uncertainty of memory being what it is ordinarily, it would be unreasonable to expect that under the circumstances here present the jurors would contain a completely revivable grasp of eleven days of testimony offered by the plaintiff more than two months before the case was finally submitted to them for consideration. *Absent such a grasp, the jury was in no position to adequately weigh the testimony offered by the plaintiff against that offered by the defendant. This the jurors were required to do if they were to arrive at a fair and just verdict.*" *Id.* at 752-53.

In *Eckstein v. Kirby*, 452 F.Supp. 1235 (E.D.Ark. 1978), the District Court rejected a constitutional attack against a statute which excluded persons with impaired hearing from jury service. The Court stated:

> "Impairment of the senses, particularly the senses of sight and hearing, vitiates a person's ability to serve effectively as a juror. *Evidentiary analysis, a juror's*

> *primary function, requires an unimpeded perception, for without the ability to perceive there is no ability to evaluate, reconcile or judge.* . . . '. . . The presence of a juror with a physical impairment of such magnitude as to interfere with the juror's ability to hear and understand the presented testimony and evidence precludes a verdict by all jurors. Such a disability would render the juror incompetent to serve and would deny (the defendant's) right to an impartial jury and a fair hearing.' . . . *[P]hysically qualified jurors are essential* to any meaningful exercise of the Sixth Amendment's jury trial guarantee and *to the fulfillment of the concept of a fair trial.*" *Id.* at 1243 (emphasis added), *quoting*, in part, *Commonwealth v. Brown*, 211 Pa. 431, 332 A.2d 828 (1974).

The analogous situations presented by the foregoing cases and the present one are plain. However, certain distinctions are also worthy of note.

Each of the foregoing authorities postulated *willing* jurors whose ability to function as comprehending triers of fact could possibly be affected by factors beyond their control. No doubt was suggested as to their commitment to give the parties a fair trial. In contrast, our case involved five jurors who deliberately abandoned all but the pretense of adherence to their oath in favor of voluntarily engaging in diverting mental activities.

Moreover, one need not be a social psychologist to observe that when a significant number of jurors ignore the proceedings in a way conspicuous to the others, they are not just depriving themselves of information necessary to render a fair verdict; they are doing something that improperly influences the remaining jurors as well. The effect is an atmosphere subversive to an intangible but important element in the judicial process; that is the jurors' collective belief that they have a serious responsibility to discharge.

When five of their number plainly demonstrate that they deem it unnecessary to pay close attention to all of the evidence in order to decide the case, the potential for causing the remaining members to take their own responsibilities less seriously is clear.

A second key distinction is also present in the cited authorities. In each case, the court was confronted with circumstances involving an effect upon trial proceedings which it could not quantify. Each dealt with circumstances that *might* have rendered jurors incapable of functioning as rational decision makers. In *Estes*, the presence of television cameras *might* have distracted the jurors. In our case, reading and solving crossword puzzles unquestionably distracted them. That, in fact, was the intended purpose of the activities. In *Eckstein*, *Citron*, and *Electronic Products*, there was cause for concern that jurors *might* fail to hear, comprehend, or recall evidence. In our case, there was no room for uncertainty. One does not need the benefit of California's presumption of prejudice to conclude that jurors who read or perform puzzles rather than trying to pay close attention to the sometimes complicated and often conflicting evidence being introduced are not giving the parties a fair trial.

No Showing of Prejudice Is Required for Reversal Where a Due Process Violation Is Demonstrated.

The Fourteenth Amendment provides more than simply a mechanism by which disputes are resolved in a rational manner: it guarantees a tribunal that functions according to certain expected norms. As this Court declared not long ago:

> "[A proper tribunal] preserves both the appearance and reality of fairness, 'generating the feeling so important to a popular government, that justice has been done,'
>
> . . .

> "Indeed, 'justice must satisfy the appearance of justice.' " *Marshall v. Jerrico*, 446 U.S. 238, 242-43 (1980).

Thus, it was the *possibility* of injustice, not proof of bias or impropriety, which long ago led this Court to hold that due process required reversal where a municipal official presiding over the case had a minor pecuniary interest in the outcome of proceedings before him:

> "There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

The same concept has been applied in administrative adjudications in which the presiding officers have an even less direct interest in the outcome. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

In similar fashion, federal courts have held that no proof of actual prejudice is required for reversal in both civil and criminal cases where the effect of demonstrated irregularities involving juries cannot be quantified. Thus, in *United States v. Gay*, 522 F.2d 429 (6th Cir. 1975), the Court held that reversal was mandatory where it was shown that the trial judge had discussed with jurors their requests to be excused, off the record and outside the presence of counsel.

The Sixth Circuit Court of Appeals declared that the absence of a record of what actually transpired required it to assume what occurred was prejudicial.

> "*Even though the appellant has not been able to demonstrate prejudice in the present case, the total absence of a record of the proceedings in which the changes in the makeup of the jury occurred requires us to assume prejudice.* We have the utmost confidence in the integrity of the District Judge who presided in these proceedings, and of the trial judges of the circuit individually and as a group. However, in a time when our judicial system is being severely questioned, *it is as important to maintain the appearance of justice and regularity as it is to be certain of their reality.*" *Id.* at 435 (emphasis added).

In a civil suit for a tax refund, the Fifth Circuit Court of Appeals similarly concluded that no showing of actual prejudice was required for reversal. During trial, the president of the corporate taxpayer had engaged in social conversation with two jurors. In reversing, the Court of Appeals held:

> "The taxpayer argues and the court concluded that no harm was done by this activity. . . . However, *if the occurrence is such as to be so inherently unfair as to reflect on the jury system, we think a mistrial should be declared or . . . a new trial should be granted. Over and above the rights of the litigants, the jury system could not long survive abuse of the type here made out.*" *United States v. Harry Barfield Company*, 359 F.2d 120, 123 (5th Cir. 1966) (emphasis added).

The *Barfield* court discussed a prior criminal case, *Pekar v. United States*, 315 F.2d 319 (5th Cir. 1963), in which a conversation between a juror and the U.S. attorney was held reversible error.

> "It is true that no evidence was offered there to show that the juror was not influenced but we reversed,

> . . . [treating] the conduct as being prejudicial *per se* and not subject to being overcome by a showing of harmlessness." *Id.* at 124.

The Court also noted:

> "In *Mattox v. United States*, 1892, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917, the Supreme Court said:
>
> " 'It is vital * * * that the jury should pass upon the case free from external causes tending to disturb the exercises of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.' " *Id.*

The Court concluded:

> "*Pekar and Mattox are criminal cases but the integrity of the jury system is no less to be desired in civil cases.* Our system of trial by jury presupposes that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence. *Any conduct which gives rise to an appearance of evil must be scrupulously avoided.* What occurred in this case exceeded the bounds of propriety and will not do. The case must be reversed for a new trial." *Id.* (emphasis added).

The misconduct at issue in our case unquestionably "gives rise to an appearance of evil." We must respectfully disagree with California Supreme Court's characterization of the intentional juror misconduct in this case as "essentially neutral." Appendix, p. 29. Whether the court is speculating that the involved jurors may have "evenhandedly" disregarded the evidence presented by both sides in equal measure, or simply that they may have done their best to render a "fair" verdict based on the fraction of the evidence they paid attention to, the misconduct would only be "es-

sentially neutral'' if it had been discovered during trial and involved jurors replaced with alternates or mistrial declared. In our case, however, the jurors' efforts to conceal their misconduct from the trial participants were successful. Thus they were able to bring their unavoidably distorted perceptions to deliberations and to provide the votes necessary to both plaintiffs' liability verdicts and the huge compensatory and punitive awards.

Moreover, the intentional nature of the misconduct causes us to take issue with the California Court's observation concerning ''neutrality'' at another level. When a juror consciously and deliberately chooses to address his or her attention to private amusements rather than the evidence being presented, it is as plain as it could possibly be that this juror is saying, by his or her conduct: ''I don't need to consider the evidence to decide this case.'' This proper inference was drawn by the unanimous California Court of Appeal and quoted with approval by dissenting Justice Richardson: '' 'Such inattention implies prejudgment of the case . . . [¶] . . . The inescapable conclusion is that the parties did not have 12 unbiased, impartial jurors.' '' Appendix, p. 39-40, Richardson, J., dissenting.

Due Process Precludes Judgments Based Upon a State Reviewing Court's Determination of Who, in Its Opinion, Would Have Prevailed in a Fair Trial.

The California Supreme Court states that the presumption of prejudice arising from the jury misconduct proved by Ford may be rebutted by either the prevailing party's affirmative showing that prejudice does not exist ''or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.'' Appendix, pp. 28-29. In our case, the prevailing

parties chose not to attempt an affirmative showing which would permit a reviewing court to place the misconduct in perspective. Accordingly, the court purports to apply the quoted alternative test. We respectfully submit that, on the facts of this case, the court's "examination of the record" test denies Ford its due process right to a fair trial because it is impossible to measure the effects of the misconduct.*

Appropriate guidance to assess the remedy to be afforded when a federal constitutional right is infringed is to be found in federal authority. Here, the relevant federal authority mandates reversal on the facts of our case.

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*The only three California Court of Appeal cases cited by the State Supreme Court (Appendix, p. 29) which relied upon an "examination of the record" test are clearly distinguishable. All involved: (a) juror consideration of "evidence" obtained outside of court *in addition to* the evidence admitted at trial and (b) a *complete* record, *viz.*, one in which the improperly received material was presented for the reviewing court's consideration. *See*, in chronological order, *People v. Martinez*, 82 Cal.App.3d 1, 20-25, 147 Cal.Rptr. 208 (1978); *People v. Bullwinkle*, 105 Cal.App.3d 82, 91-92, 164 Cal.Rptr. 163 (1980); and *People v. Phillips*, 122 Cal.App.3d 69, 81, 175 Cal.Rptr. 703 (1981). In such situations, where all the facts are known, there is some logic to the reviewing court applying a standard identical to that which it would apply if the improperly obtained evidence had been erroneously admitted at trial.

Moreover, the California Supreme Court's "examination of the record" test cannot be reconciled with its own recent holding in *People v. Pierce*, 24 Cal.3d 199, 155 Cal.Rptr. 675 (1979). There, a juror sought and obtained information out of court from a prosecution witness. In denying Pierce's motion for new trial, the trial court had applied the test whether it was ". . . 'reasonably probable that a result more favorable to the defendant would have been reached in the absence of error.' " 24 Cal.3d at 206-07. In absolute language, the California Supreme Court declared this reweighing of the evidence to be improper where unrebutted proof of juror misconduct was concerned:

> "[J]ury misconduct raises a presumption of prejudice; and *unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial*. [Citations.]" 24 Cal.3d at 207 (emphasis added).

In so holding, the court expressly refused to engage in what it termed "sheer speculation" that the involved juror's vote would have been the same in the absence of the misconduct. *Id.* at 208.

In federal civil actions involving juror misconduct, courts have applied a rebuttable presumption of prejudice test, but couched in strong terms which place the burden of proof upon the prevailing litigant, not the aggrieved party or the reviewing court. Thus, in *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 105-06 (5th Cir. 1954), *cert. denied sub nom., Applebaum v. Paramount Pictures, Inc.*, 349 U.S. 961 (1955), the test was framed as follows:

> "The solution of this question does not require a positive finding that the jury was actually influenced by what took place; but rather involved the determination as to whether or not it was made *reasonably certain* that they were not." (Emphasis added.)

And in *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, sub nom., *Rhodes v. Krause*, 435 U.S. 924 (1978), a civil case involving an egregious intrustion on the jury process (threats on the life of a juror), the court expressed the test in the following terms:

> "[T]he party seeking to avoid a new trial has the burden of showing the entire absence of any influence on the verdict or the probability that such influence existed." *Id.* at 568.

In criminal cases, the test universally applied since *Chapman v. California*, 386 U.S. 18 (1967), *rehearing denied*, 386 U.S. 987 (1967), has required the *prosecution* to establish the absence of prejudice *beyond a reasonable doubt*.

We have found no case involving interference with the correct functioning of a jury in which punitive damages or civil penalties are involved. The close parallel that this Supreme Court has noted between penal and punitive damages actions* suggests that the *Chapman* standard should prop-

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*"[P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are *private fines* levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (Emphasis added).)

erly be applicable to a case such as ours where a punitive award is involved.*

But whether the standard applicable to a case such as ours is deemed to be that articulated in federal criminal cases or federal civil cases, certain points are clear. In both types of actions, interference with the proper functioning of the jury creates a presumption of prejudice under which the *prevailing party* must bear the burden of demonstrating, *in specific terms*, the absence of an adverse influence on the verdict. Similarly, in neither civil or criminal cases, insofar as we have been able to determine, has a reviewing court deemed it appropriate to assess the question of prejudice by reference to the general quantum of evidence. Both of these propositions hold true in those cases which, like ours, involve the potential inability of the jury to properly weigh the evidence presented at trial.

In *Estes v. Texas, supra*, this court recognized the impossibility of quantifying the effect of T.V. cameras in the courtroom, but required no showing of *actual* prejudice to hold this denied defendant due process. As the court noted: "One cannot put his finger on [television's] specific mischief and prove with particularity wherein he was prejudiced." 381 U.S. at 544. The court deemed it sufficient to cite various *possible* impediments, including juror inattention, which the presence of television *might* have introduced into the trial.

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*The Fifth Circuit Court of Appeals recently applied criminal law standards in its review of a due process contention involving a punitive damages statute in *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1181, fn. 76 (5th Cir. 1982), noting:

> "Although [the statutes] applied here are civil, not criminal, in nature, they can be labelled penal or quasi-criminal because they address fraud and permit punitive damages for violation. In order to err on the side of caution, we will apply criminal law standards in our due process analysis."

In his concurrence, Chief Justice Warren chose to focus on the importance of preserving not just the appearance of a fair trial but the elements necessary to its fairness as well:

> ". . . the Fourteenth Amendment is [not] to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though 'every form (be) preserved,' the forms may amount to no 'more than an empty shell' when considered in the context or setting in which they were actually applied." *Id.* at 560.

Agreeing that no showing of actual prejudice was required for reversal, the Chief Justice observed:

> "The prejudice of television may be so subtle that it escapes the ordinary methods of proof, but it would gradually erode our fundamental conception of trial." *Id.* at 578 (footnotes omitted).

Similarly, in *Citron v. Aro Corporation, supra*, the court required no proof of actual prejudice to hold that interruptions in the trial proceedings *might* have impaired the jury's ability to "adequately weigh the testimony . . . [as] the jurors were required to do if they were to arrive at a fair and just verdict." 377 F.2d at 752-53. The court declared:

> "The question for decision is whether the error may be disregarded as harmless in the absence of affirmative showing of prejudice. We think not.
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> * * * *
>
> "Since the error was one related to the substantial rights of the plaintiff and prejudice was clearly within the range of possibility, a demonstration of prejudice was not required. [Citation.] It is the settled rule that an error 'which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.' [Citations.]" *Id.* at 752.

In the present case, like *Estes* and *Citron*, no review of the record could possibly establish that Ford was not deprived of its right to a jury able to comprehend and weigh all of the evidence. In our case, unlike *Estes*, the distraction was neither accidental or hypothetical; it was intentional and proved. In our case, in contrast to *Citron*, we are not dealing with the possibility that evidence may not have been remembered but rather the certainty that evidence was not received. Proved juror misconduct caused the evidence presented at our trial to be neither fully nor fairly considered. As it is impossible to prove that this fact had no influence on the verdict, due process mandates reversal.

A State Which Elects to Prohibit Post-Trial Evidentiary Hearings Concerning Juror Misconduct Must at Least Compensate for This by Application of a Presumption of Prejudice Which Is Real, Not Illusory.

Federal law has long held it to be a violation of due process to declare a jury irregularity harmless in a criminal case without affording the aggrieved litigant a right to a full evidentiary hearing. In *Remmer v. United States*, 347 U.S. 227 (1954), this Court held it was improper for the trial judge to dismiss post-trial charges of jury tampering (an offer to bribe a juror) without a full evidentiary hearing to determine the circumstances of the misconduct and its effect on the juror. As this Court declared:

> "The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." 347 U.S. at 229-30.

Most recently, in *Smith v. Phillips*, *supra*, 455 U.S. at 215-216, this Court noted:

> "This court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. . . .
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> * * * *
>
> ". . . '. . . Preservation o the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.' " (quoting from *Dennis v. United States*, 339 U.S. 162, 171-72 [1950].)

In a separate concurrence, Justice O'Connor explained the benefits afforded by a hearing:

> ". . . A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case." *Id.* at 222, O'Connor, J. concurring.

As we have noted, *supra*, at 2-3, California law expressly bars the sort of post-trial evidentiary hearing described in *Smith* and *Remmer*. *Linhart v. Nelson, supra*, 18 Cal.3d at 644-45. Ford had no opportunity to compel the involved jurors to explain and disclose the scope of their misconduct in this case. Under these circumstances, the presumption of prejudice is the only protection against a litigant being deprived of his federal constitutional right to full consideration of his evidence in a fair trial.*

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*It is noteworthy that the presence of an able and conscientious trial judge provides scant insulation of this right in a California civil jury case. California law provides that such judge may not grant a new trial on evidentiary grounds: ". . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." California Code of Civil Procedure section 657.

Thus it is, we submit, imperative to fulfillment of due process that the presumption of prejudice be real and not simply a "teasing illusion."* Where, as here, the aggrieved litigant has proved intentional prolonged misconduct involving nearly half the members of the jury and there is no evidence to permit a reviewing court to make an independent evaluation of the effect of the misconduct on the minds of the jurors involved, that should be the end of the matter. Ford should be entitled to a new trial.

CONCLUSION.

Federal authority makes it clear that an essential element of Fourteenth Amendment due process is a trier of fact willing and able to receive and consider all of the evidence presented by the parties. In this case, Ford has been denied this fundamental right. Unrebutted evidence showed that five jurors deliberately diverted their attention from the proceedings at trial in favor of playing at private amusements: they did so secretly and, by all accounts, for an extended period of time. As noted by Justice Richardson:

> "The misconduct was not the momentary dozing of a single juror in an isolated incident. Rather, it involved almost half the jury in frequent, prolonged, intentional mental activity of a type that was diverting and that required thought and contemplation." Appendix, 39, Richardson, J., dissenting.

Federal Law has long been sensitive to any appearance of bias in a trier of fact (*Tumey, supra*), and has declared it to be a violation of Fourteenth Amendment due process to declare a jury irregularity harmless without first affording the aggrieved party a full evidentiary hearing to give him an opportunity to show bias. *See Remmer, supra*; *Smith v.*

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*". . . like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941), Jackson, J., concurring.

Phillips, supra. Where, as here, state law affords no opportunity for such hearing, due process must demand more than a presumption of prejudice which is ephemeral in its application.

Nothing in the California Supreme Court's opinion suggests that Ford produced less than substantial evidence to support its case on liability and damages. Nothing in the Court's characterization of plaintiffs' *liability* evidence as "overwhelming" detracts from this. It is impossible to conclude on the basis of a review of the record that the result would have been the same if Ford were not denied the right to a fair trial in a fair tribunal afforded it by the Due Process Clause of the Fourteenth Amendment. (Cf. *United States v. Gay, supra*, 522 F.2d at 435). Ford should be entitled to no less. We respectfully urge that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of California Supreme Court in *Hasson v. Ford Motor Company.*

In the Supreme Court of the State of California.

James M. Hasson, a Minor, etc., et al., Plaintiffs and Appellants, v. Ford Motor Company, Defendant and Appellant. L.A. 31527. Super Ct. No. C 989 523.

Filed: September 16, 1982.

Defendant appealed from a substantial jury verdict awarded against it in this product liability action; plaintiffs cross-appealed from the trial court's reduction of the compensatory portion of the award. The Court of Appeal overturned the judgment in its entirety and ordered a new trial on the sole ground of juror misconduct. We granted a hearing primarily to clarify (1) under what circumstances juror inattentiveness during trial proceedings will constitute misconduct requiring a new trial, and (2) what type of evidence may be introduced to establish or rebut claims of juror misconduct. Because the Court of Appeal resolved the juror misconduct issue, albeit incorrectly, it did not reach defendant's remaining assertions of error. As will appear, we conclude that none of defendant's contentions has merit.

One evening in July 1970, James Hasson, then a 19-year-old college freshman, borrowed his father's 1966 Lincoln Continental to take some visiting friends on a tour of portions of the Los Angeles area. He drove his friends to the top of Mount Olympus Drive to see the view. As the car descended, it brakes failed. James' efforts to slow the car by using the emergency brake and by throwing the transmission into reverse proved unavailing, and the vehicle careened down the steep, curving street, eventually crashing into a fountain at the base of the hill. Although the four passengers escaped serious injury, James did not. He suf-

fered a severely fractured skull which caused extensive brain damage and abruptly ended his pursuit of a college education and projected medical career. In addition, he has encountered profound psychological problems and total, permanent physical disability.

James and his father filed suit in 1971 against Ford Motor Company (Ford), the manufacturer of the automobile, and against other defendants for damages sustained as a result of the accident. The trial court submitted the case to the jury on strict liability and negligence theories, and the jury returned a verdict of $1,123,840 against Ford. On a prior appeal, we reversed that judgment because the judge erred in failing to instruct the jury on the defense of contributory negligence, although we found the evidence sufficient to support a verdict against Ford. (Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530.)

The case was retried in 1978 with Ford the sole defendant and James' negligence no longer a significant issue. Again, the plaintiffs relied on theories of strict liability and negligence. They attempted to prove that the accident was the result of brake failure which occurred when during operation of the vehicle the brake fluid heated up enough to cause it to vaporize. Although the fluid in Hasson's Continental had a boiling point of 555°F when installed at the factory, it had a boiling point of 304° or less when tested after the accident. The reduced boiling point corresponded to a vaporization temperature of only 275°F to 280°F. The reason for the drastic reduction in boiling point — and consequently in the temperature at which brake failure could occur — was that the fluid had a hygroscopic quality; that is, it tended to absorb water vapor. As more moisture was absorbed into the brake fluid, its boiling point became lower. Hasson's experts testified that Ford was aware of the danger of brake failure due to heat-induced fluid vaporization; they ex-

pressed the opinion that Ford should have increased the safety of the brake system by measures such as warning dealers and owners to periodically replace used fluid with new fluid having a higher boiling and vaporization point. Alternatively, plaintiffs' experts testified that Ford could have installed a dual master cylinder at minimal cost to prevent complete brake failure in the event of fluid vaporization.

The necessity of proving this highly technical theory of liability caused the retrial to be lengthy and complex. It lasted nearly 3 months, required the calling of 50 witnesses, and generated a reporter's transcript of almost 6,000 pages. Hasson and Ford produced experts who testified in excruciating detail about the design of the brake system installed in 1965 and 1966 Lincoln Continentals, the scientific properties of brake fluid, and measures Ford could or should have taken to alleviate the danger of brake failure. Furthermore, there was extensive proof of James' catastrophic injuries and his years of medical history since the accident.

The jury found Ford to be negligent and strictly liable in tort; it awarded plaintiffs $7,570,719 in compensatory damages and $4,000,000 in punitive damages. After the ensuing judgment, Ford moved for a new trial; it asserted numerous grounds therefor, including several varieties of juror misconduct. The court ruled that the compensatory damages award was excessive and compelled plaintiffs to consent to a reduction of the award to a total of $9,247,719 in order to avoid a new trial. (See Code Civ. Proc., § 662.5, subd. (b).) The other grounds for a new trial were rejected, and judgment was entered for the reduced amount.

I.

Ford mounts a detailed challenge to the sufficiency of the evidence to support each of the findings of the jury, including the existence of negligence or a defect in the brakes

on the accident vehicle, causation, and grounds for punitive damages. Ford has skillfully attempted to persuade us that the jury should have accepted its version of the facts. Unfortunately, that effort is largely misdirected.

In 1977, when this court unanimously overturned the first jury verdict against Ford, the majority opinion by Justice Richardson summarized the accepted principles governing appellate review of a jury's factual determinations: "We do not reweigh the evidence on appeal, but rather determine whether, after resolving all conflicts favorably to the prevailing party [citations], and according prevailing parties the benefit of all reasonable inferences [citation], there is substantial evidence to support the judgment." (Hasson v. Ford Motor Co., supra, 19 Cal.3d 530, 544.) The evidence, viewed in light of these principles, was found to be amply sufficient "to support a determination that fluid vaporization was a proximate cause of the accident." (*Id.*, at p. 545.) After a second trial and a second unfavorable jury verdict, Ford's main argument for reversal is an augmented version of the sufficiency claims we previously rejected. Ford's prolix briefs summarize virtually all the evidence adduced at trial and point out its strengths and weaknesses. However, that showing is largely irrelevant to the issue on appeal: whether the evidence in plaintiffs' favor provides a sufficient basis for the jury's findings. Ford's elaborate factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail.

The primary theory advanced by plaintiffs at trial was that the design of the disc brake system installed on 1966 Lincoln Continental automobiles was defective because it could potentially generate enough heat during normal operations to cause the brake fluid to vaporize, resulting in

total loss of braking capability. Ford introduced the disc brake system on the 1965 Lincoln Continentals, the first time that an American automobile manufacturer had offered disc brakes as standard equipment on a domestic model. The new braking system was considered a breakthrough because it was believed to provide more predictable and dependable braking than the drum brakes then in general use. However, it had one important disadvantage: disc brakes tend to generate tremendous amounts of heat during use. Hydraulically operated brakes rely for their effectiveness on the principle that brake fluid is incompressible, so that an application of pressure to the pedal results in an instantaneous transfer of force to all four wheels, actuating the wheel cylinders which press the brake linings against a revolving rotor, slowing the forward progress of the vehicle. The heat produced by friction between the rotor and the lining must be dissipated into the surrounding atmosphere and the other components of the brake system. In the disc brake system, the wheel cylinders are located very close to the point of contact between the lining and rotor. Therefore, the fluid tends to heat up during application of the brakes. When the fluid reaches a certain temperature, it instantaneously vaporizes and becomes compressible, so that the driver is able to depress the brake pedal all the way to the floorboard without encountering any resistance — and without achieving any braking power.

Fluid vaporization is an insidious cause of brake failure: its symptoms disappear and full pedal returns as soon as the fluid cools down by a few degrees. Thus, an inspection conducted shortly after total brake failure might disclose no indication that fluid boil had occurred.

Shortly after releasing its 1965 Lincoln Continentals, Ford began to receive numerous complaints of brake loss attributable to fluid boil. As a result, all the 1965 models

were recalled in an attempt to alleviate the problem. The main modifications were the installation of a dust shield designed to increase the flow of air across the brakes and the replacement of the brake fluid with one having a much higher "dry" boiling point. The "dry" boiling point is the temperature at which newly installed fluid will come to a boil. During use, brake fluid tends to absorb moisture, lowering its boiling point considerably. For purposes of brake failure, the significant factor is the fluid's vaporization point, which is somewhat lower than its boiling point. The fluid originally installed on the 1965 Lincoln Continentals had a dry boiling point of 375°F; the replacement fluid had a dry boiling point of 550°F. Unfortunately, the 550°F fluid tended to absorb water vapor at a higher rate; after a few years of use, its actual boiling point was no higher than that of used 375°F fluid.

Ford argues that the jury could not reasonably have found that the disc brake system on the accident vehicle was defective, but the evidence is to the contrary. It was established that the vaporization temperature of the 550°F fluid lowered dangerously in use. The evidence further indicated two possible ways Ford could have alleviated the danger of brake loss: (1) by warning dealers and users that the brake fluid should be periodically replaced with fresh fluid having a higher boiling and vaporization point; and (2) by installing as factory equipment a dual master cylinder or by recalling the cars and retrofitting them with the dual master cylinder.

Periodic replacement of the brake fluid would have substantially reduced the danger of fluid vaporization. The dual master cylinder would have essentially created two separate braking systems, one for the front wheels and one for the rear wheels. In the event that fluid vaporization did occur, the dual master cylinder would enable the alternate system to continue functioning, thus preventing total failure. Ford

installed dual master cylinders on its 1967 Lincoln Continentals, indicating that the system was available well before the accident in question occurred.

As an alternative to finding the system to be defective the jury could have found that Ford was negligent: Ford was aware of the danger of brake failure posed by the disc brake system, yet did not take adequate measures to eliminate the danger.

With respect to the issue of causation, Ford claims the evidence conclusively established that fluid boil could not occur in normal usage. Thus, it reasons, either the brake failure on the accident vehicle had a different cause; or James Hasson abused the brakes by "dragging" them, i.e., driving with his right foot on the accelerator and his left foot resting on the brake pedal.[1] However, James testified unequivocally that he was not dragging his brakes on the date of the accident. Further, there is ample evidence consistent with the theory that fluid boil caused the accident, even though the car was being operated in a normal manner. Justice Richardson's analysis of this issue after the first trial remains accurate: "The record included evidence that air temperatures were warm on the day of the accident, which would tend to diminish the cooling effect of ventilation of the brakes. The driving pattern was stop-and-go over hilly terrain, meaning frequent application of the brakes, plus the additional buildup, or soakup of heat which occurs when already warm brakes are allowed to stand momentarily with-

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[1]Ford separately raises the related contention that the jury's verdict that James Hasson was not negligent is inconsistent with their probable conclusion that fluid boil caused the accident. Ford argues that the fluid boil could not have occurred if Hasson had not been dragging his brakes prior to the accident. As we explain, the jury could rationally have concluded on the basis of the evidence presented to it that brake failure occurred during normal operating conditions.

out ventilation. Plaintiffs' experts pointed to characteristics of disc brakes in general, as well as specific features of the 1966 Lincoln's brake system design in particular, which they believed would contribute to the buildup of heat under such conditions. Moreover, the symptoms described by the passengers and other witnesses — the apparent sudden, complete loss of pedal pressure (supported by the absence of skid marks) and return of pedal within 45 minutes after the accident (confirmed by investigating officers) — were entirely consistent with plaintiffs' theory of the accident.

. . .

"Ford elected not to dispute much of this evidence, suggesting rather, that the entirety of the evidence, including the results of its own tests, was more consistent with the probability of driver error as the sole cause of the accident.

"The jury, of course, was not compelled to accept Ford's view simply because more than one inference could reasonably be drawn from the record. So long as the foundation for the opinions of plaintiffs' experts was sufficient, as we think it was, the jury was entitled to consider those opinions in forming its own conclusions. It was the function of the trier of fact to weigh all the evidence and to draw any reasonable inferences it found warranted.

"We think the inferences here drawn were reasonable. That the evidence might also have supported Ford's version of the accident is irrelevant on appeal. We therefore hold that there was sufficient evidence to support a determination that fluid vaporization was a proximate cause of the accident." (Hassan v. Ford Motor Company, supra, 19 Cal.3d at p. 545.)

Ford additionally claims that the evidence at trial was not sufficient to support the jury's punitive damages award. Once again, Ford draws our attention to evidence it deems

favorable to its position and asks that we upset the verdict because of the strength of such evidence. As we have previously stated, Ford has a difficult hurdle to overcome: It must convince us of the absence of substantial evidence on which the jury could have based its verdict; a mere conflict of evidence will not suffice. (E.g., Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429.)

Punitive damages are appropriate if "the defendant has been guilty of oppression, fraud, or malice. . . ." (Civ. Code, § 3294.)[2] "[A] conscious disregard of the safety of others may constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." (Taylor v. Superior Court (1979) 24 Cal.3d 890, 895-896.)

Mindful of the limited scope of appellate review, we now examine plaintiff's evidence to determine its sufficiency. Plaintiffs' showing emphasized heavily the testimony of Harley Copp, a former Ford employee for 30 years who held numerous high level engineering and management positions. Copp testified, inter alia, that although Ford knew of the fluid boil problem with its Continentals from dealer and customer complaints, it deliberately failed to warn deal-

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[2]In an appendix to its opening brief, Ford offers a number of theories for holding section 3294 unconstitutional. It is not necessary to devote extensive discussion to the question; the courts have frequently and uniformly upheld that provision's validity. (E.g., Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 819; Bertero v. Nat'l Gen. Corp. (1974) 13 Cal.3d 43, 66, fn. 13; Zhadan v. Downtown L.A. Motors (1976) 66 Cal.App.3d 481, 489; Merlo v. Standard Life and Acc. Ins. Co. (1976) 59 Cal.App.3d 5, 19-20; Wetherbee v. United Ins. Co. (1971) 18 Cal.App.3d 262, 266; Fletcher v. Western Nat'l Ins. Co. (1970) 10 Cal.App.3d 376, 404; Toole v. Richardson-Merrell Inc. (1967) 251 Cal.App.2d 689, 716-717.)

ers or owners of available remedial steps because it was protecting the Continental's reputation among consumers. He further testified that Ford deliberately failed to run adequate tests to accurately define the nature of the brake loss problem and deliberately failed to install a dual master cylinder on the 1966 Continental as original equipment or on recall.

At one point, plaintiffs' counsel directed the following question to Copp: "Was there anything in the owner's manual to indicate that . . . if there was any kind of a fluid boil, that there would be no brakes at all?" Copp responded: "No. The tags . . . on the steering wheel, and in the owner's manual . . . [don't] say anything about a potential brake failure."

When asked: "In your opinion was there a conscious disregard of safety on the part of Ford with respect to not putting a dual master cylinder on the 1966 Lincoln Continental?" He answered: "Yes."

Dr. John Albert Fellows, a scientist and consultant, testified that Ford management had "adopted a policy of advertising that the Lincoln was free [from] the need of service for at least a good portion of its components . . . and that they were opposed to abandoning that policy in public recognition."

Despite this evidence, Ford now asks us to set aside the jury verdict because of asserted inconsistencies and conflicts in testimony favorable to plaintiffs. The jury, however, was responsible for judging the credibility of the witnesses; it would be wholly improper for us to usurp that function by reweighing the evidence. We hold that substantial evidence supports the award of damages.

II.

Ford argues that the trial court erred in admitting evidence of prerecall brake failures in 1965 models. This contention is easily resolved. At trial, Ford contended that the 1966 brake system was substantially different because of design modification instituted pursuant to the recall campaign and maintained on 1966 models: The 1966 system's fluid had a higher dry boiling point; Ford also installed a vented dust shield and changed the brake lining. Plaintiffs countered with expert testimony suggesting that the changes were insignificant and, in the case of the vented dust shield, completely ineffective. The trial court plainly had a reasonable basis for admitting evidence of the numerous failures occurring in 1965 models for the purpose of showing the nearly identical 1966 models to be similarly defective. Plaintiffs were not required to prove that the 1965 system was exactly the same as the 1966 system. "Identical conditions will rarely be found. Substantial similarity is normally sufficient." (Jensen v. Southern Pacific Co. (1954) 129 Cal.App.2d 67, 74.) This determination "is primarily the function of the trial judge." (*Ibid.*)

The trial court also admitted into evidence letters sent to Ford and testimony describing incidents of brake failure in 1965 and 1966 Lincoln Continentals. One letter informed Ford that a certain private toll road had been closed to Lincoln Continentals as a result of reports of brake failures occurring with Lincolns using the road. A second letter complained of a brake failure — impliedly due to fluid boil — occurring in a postrecall 1965 Lincoln Continental. Two Continental owners related instances of brake failure. The evidence was offered as proof that Ford had notice that the fluid boil problem persisted after the brake system was modified by the addition of different brake fluid and the vented dust shield. Ford argues that the trial judge abused

his discretion by admitting the evidence because the circumstances surrounding the reported brake failures were not similar enough to those surrounding the failure which caused Hasson's accident (See Ault v. International Harvester Co. (1974) 13 Cal.3d 113, 121-122; Kopfinger v. Grand Central Pub. Market (1964) 60 Cal.2d 852, 861.)

When evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: " 'all that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation. . . .' " (Laird v. T.W. Mather Inc. (1958) 51 Cal.2d 210, 220.)

It does not appear that the evidence was improperly admitted; there were sufficient facts from which the jury could have justifiably inferred that these postrecall failures were the result of fluid boil. All of the incidents were characterized by the sudden loss of all pedal and brake function after a period of continuous hard use. In several of the incidents, the evidence showed that full pedal returned within a brief period after total failure, a clear symptom of fluid boil. Although the trial judge might justifiably have excluded some of the evidence on the ground that its potential for prejudice outweighed its probative value (see Evid. Code, § 352), he did not abuse his discretion by admitting it.

III.

Ford raises several assertions of error concerning the trial court's rulings on requested jury instructions.

Plaintiffs' theory at trial was that the accident occurred because of a defectively designed brake system which allowed the brake fluid to overheat and vaporize, resulting in a complete loss of braking power. Ford, in contrast, theorized that the accident was caused by a booster hose that was improperly installed by a mechanic when the car

was serviced, so that it later became disconnected and caused brake loss. Ford requested and was denied an instruction that the disconnected booster hose was a superseding cause of the accident. (See generally Phillips v. G.L. Truman Excavation Co. (1961) 55 Cal.2d 801, 806.)

In Self v. General Motors Corp. (1974) 42 Cal.App.3d 1, cited by Ford, the Court of Appeal reversed a verdict for plaintiff because the trial judge incorrectly denied defendant's request for an instruction on superseding causation. In *Self*, plaintiff's car burst into flames after being hit from behind. Plaintiff argued that the fire resulted from a design defect, the unsafe location of the fuel tank. General Motors, however, contended that the impact of the collision was so great that even a properly located fuel tank would have caught fire. The Court of Appeal held that it was error not to instruct the jury that the harm caused by the defective tank placement could have been superseded by the sheer force of the impact. *Self* is factually distinguishable: Here, a disconnected booster hose would not have caused a complete brake loss; plaintiff would have only lost the "power assist" braking capability. He would not have experienced the total brake failure to which he testified: "[T]here was no resistance whatsoever and the brake pedal went straight to the floor. . . ." Therefore, the hose problem could not have been a superseding cause; it was at most a concurrent cause of the accident, and the jury was instructed on the theory of concurrent causation. The trial court acted correctly in refusing the proffered instruction.

Ford maintains that the trial court erred by giving plaintiff's nondelegable duty instruction: "The manufacturer of a completed product cannot delegate to anyone its duty to have its product delivered to the ultimate user free from dangerous defects." Ford maintains that the instruction misstates the holding of the case from which it derives. That

opinion used the phrase "ultimate purchaser" rather than "ultimate user." (Vandermark v. Ford Motor Company (1964) 61 Cal.2d 256, 261.) Ford also claims the instruction was "thoroughly misleading" (see Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 670) because it suggests that Ford would be liable for defective maintenance. Although the instruction is not a verbatim quotation from *Vandermark*, it is an accurate statement of the law. In *Vandermark*, we noted that " '[A] manufacturer is strictly liable in tort when an article he places on the market . . . proves to have a defect that causes injury to a human being.' " (*Vandermark, supra*, 61 Cal.2d at p. 261, quoting Greenman v. Yuba Power Products, Inc. (1963) 59 Cal.2d 57, 62.) This duty runs to *all* who are injured by a defective product, not just ultimate purchasers. (Elmore v. American Motors Corp. (1969) 70 Cal.2d 578, 586.) Moreover, the jury was explicitly instructed that Ford was liable only for manufacturing defects that existed when the car left Ford's possession.

Ford also contends that the trial court incorrectly instructed the jury on the existence of a manufacturing defect because no substantial evidence had been advanced to support the instruction. The only possible manufacturing defect in the particular Lincoln Continental owned by Hasson would have been a defectively installed booster hose. Ford argued at trial that if the hose was improperly connected, faulty maintenance at the dealership was responsible, not incorrect factory installation. Ford's theory was based on the testimony of the car's former owner that he "had all new hoses replaced under the hood." Further, a Ford employee testified that the marks on the booster hose removed from the accident vehicle indicated that it was a replacement hose, not an item of original equipment. On the other hand, there was evidence that the brake booster hose in question

was designed to last for the life of the car so that it would not normally be replaced routinely. Therefore, it might reasonably be inferred that, despite the employee's testimony, the booster hose had not been replaced. Alternatively, the evidence supported the inference that if replacement had occurred, it was necessitated by defective factory installation of the original hose. Although the evidence of a manufacturing defect was not strong, the jury might reasonably have believed plaintiff's version of the facts.

Ford insists that it was prejudicial error for the court to have instructed the jury that the standards of the Society of Automotive Engineers (SAE) were only "minimal." A substantial amount of evidence was introduced at trial about government and industry standards for automotive products. The jury was instructed that "[s]tandards concerning component parts of braking systems of automobiles promulgated by the [SAE] are only minimal in nature and do not establish the standard of care for a reasonable manufacturing company under the circumstances of this case." Ford asserts that it was prejudicial error for the judge to characterize the standards as minimal without any probative facts in evidence on this subject. Ford insists that the jury was invited to erroneously conclude that the SAE did not observe very high standards and, therefore, neither did Ford. But Ford misunderstands the instruction. Objectively viewed, the instruction means only that compliance with industry standards does not always insulate a manufacturer from negligence liability. "[W]hen the manufacturer or supplier knows of, or has reason to know of, greater dangers [despite compliance with regulations] its duty . . . may not be fulfilled." (Stevens v. Parke Davis & Co. (1973) 9 Cal.3d 51, 65.)

Ford requested an instruction that custom in the industry "is relevant and ought to be considered, but is not neces-

sarily controlling on the question whether or not [the defendant] exercised ordinary care. . . .'' Ford maintains that the trial court erred in refusing the requested instruction. However, Ford was unable to show that any custom or practice had developed regarding industry design, manufacture, or maintenance of disc brake systems. This was largely because the disc brake system was new; Ford was the first American car manufacturer to introduce it as standard equipment. The system was introduced in 1965, one year before plaintiff's car was manufactured. Other American car manufacturers marketed disc brakes in 1965, but only as optional equipment. Ford's reliance on the custom and practice of other manufacturers regarding drum brakes is inapposite because the two systems are fundamentally different. The judge correctly refused to give the instruction.

IV.

Ford asserts that reversal is necessary because of a number of instances of juror misconduct.

We may easily dispose of the contention that a retrial is necessary because two jurors concealed bias against Ford when questioned on voir dire. Ford points out that no juror responded when counsel for Ford floated this question to an assembled group of potential jurors: ''I believe Mr. Harney [counsel for plaintiffs] asked you if you had been involved in litigation arising out of automobile accidents. Are there any of you who have been involved in lawsuits for any other reason?'' One of the jurors present when that question was propounded had been a defendant in several lawsuits brought by large corporate creditors. Another juror remained silent when he was among a group of potential jurors who were asked whether any of them had ''dealt with brain injuries''; the juror did not volunteer the fact that his son had died as a result of brain damage sustained in an

automobile accident. Not surprisingly, Ford cites no authorities to support its claim that these facts establish misconduct. It is difficult to see how either of these incidents involving failure to affirmatively respond to such generalized inquiries asked of a group of jurors can be thought to amount to concealment of bias. (Cf. Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal.3d 98, 110.) Moreover, Ford presented no evidence of actual bias other than the jurors' silence on voir dire; and the trial court, in denying a new trial on this ground, impliedly determined that there was insufficient proof of concealed bias.[3] We see no reason to disturb that finding.

Similarly unpersuasive are Ford's claims of misconduct due to one juror's nighttime legal studies during trial and the alleged reading of prejudicial newspaper articles. During the final three weeks of trial, one juror attended night classes in paralegal studies. The subject of one class was the law of products liability. Ford interviewed the lecturer and obtained a declaration stating that he discussed a case in which a jury awarded a large amount of damages to an individual badly injured when the gas tank on his Ford Pinto exploded in flames after a collision. Ford was subjected to punitive damages because, in order to save money, it had consciously decided to abstain from modifying the Pinto in the manner necessary to make it more safe. Plaintiffs' counsel obtained counterdeclarations from the lecturer and the juror in question pointing out that the class was designed for beginners and did not cover in detail the subject of products liability.[4]

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[3]When it ruled on Ford's motion for a new trial, the trial court stated: "The court finds that there was [*sic*] no improprieties on the part of the jurors, individually, which would warrant the granting of such a motion."

[4]Of course we cannot consider that portion of the juror's counteraffidavit disclaiming misconduct because she "did not understand" any references the instructor might have made to Ford. (Evid. Code, § 1150, subd. (a); People v. Stokes (1894) 103 Cal. 193, 197-198.)

Ford argues that the juror's paralegal studies amounted to the improper reception of evidence concerning the subject of the trial (see, e.g., Smith v. Covell (1980) 100 Cal.App.3d 947, 952-953), implying that the juror purposely sought out extrajudicial opinion concerning the issues at trial. We review the record differently: The juror's decision to undertake paralegal studies during trial appears to have been wholely coincidental. If she intended to solicit improper evidence, she certainly undertook a circuitous route toward that objective. The lecturer's declaration, viewed objectively, indicates merely that a juror inadvertantly attended a single class where the subject of an arguably related piece of litigation was mentioned in passing. The juror's actions were not misconduct.

Ford also charges that some of the jurors were exposed to prejudicial newspaper articles which discussed litigation concerning Ford Pinto automobiles. One juror declared that an alternate juror brought in an article about a Pinto accident in which three teenage girls were killed; she further stated that some jurors "read and discussed" the article. The juror also declared: "On another occasion during the trial, I observed that some jurors were reading a newspaper article brought into the jury room by Alternate Juror Rash. They were reading and discussing an article on the lawsuits and accidents concerning the Pinto automobile. During this discussion, Mrs. Davis said that there must be something to Hasson's case if Ford is paying for all these Pinto accidents." A second affidavit stated: "During the middle part of the trial, I saw some jurors in the jury room reading and discussing an article in a newspaper concerning the problems with the Pinto gas tank." The second article discussed a case in which a child orphaned in a Pinto crash received a settlement for $600,000.

Plaintiffs' counsel solicited contrary declarations. Alternate Juror Rash, the one said to have provided the inflammatory articles, stated that "I did not present to any juror in the Hasson case any newspaper article concerning the Ford Pinto automobile, nor did I engage in any discussions or conversations concerning the Ford Pinto automobile." He also denied discussing any other lawsuits or verdicts against Ford. Eleven jurors, including juror Davis, declared that "I did not see Alternate Juror Rash present or allude to any newspaper article concerning the Ford Pinto automobiles, nor did I hear any discussion concerning the Ford Pinto automobile." Juror Davis specifically denied making the statement that "there must be something to Hasson's case. . . ."

It does not appear that Ford met its burden of establishing misconduct due to the improper reception of evidence. Although the two affidavits it presented constitute a prima facie showing of misconduct, they are directly rebutted in all important respects by a number of counterdeclarations. The trial court correctly declined to settle this "battle of the juror declarations" in Ford's favor by granting a new trial.

In support of its claim of juror misconduct due to inattentiveness at trial, Ford presented three juror declarations stating that one fellow juror was observed reading a novel entitled "A Night in Byzantium" during trial proceedings. Two of the declarations said that this activity took place "while witnesses and evidence were being presented."[5] The declarations did not specify which side was presenting evidence during the novel-reading, nor did they cite specific

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[5]Accordingly, there is no foundation for plaintiffs' speculation that the jurors' purported distraction may have taken place during lapses in the trial court proceedings, e.g., when the court was in recess or when counsel and the court were engaged in argument out of the hearing of the jury.

dates; they stated variously that the juror read the novel "over approximately a one-month period," "[o]n many occasions," and "intermittently over a period of many days." Two of the declarations further noted that certain jurors had worked crossword puzzles at unspecified dates and for unspecified periods of time "while evidence and testimony were being presented." Four of the identified jurors, however, signed counterdeclarations containing this statement: "I specifically deny that I did not pay attention to the testimony of witnesses and evidence being presented during the trial or that I was reading extraneous material or doing crossword puzzles in any manner or to any extent, whereby I was not able to pay close attention to the testimony of each and every witness and the presentation of all evidence in open court. I specifically state that I did pay attention to all testimony and evidence presented during the trial herein." The counterdeclaration of a fifth accused juror did not contain the above disclaimer. None of the counterdeclarations denied engaging in the alleged activities during trial; they sought to show only that no activities had diverted their attention from the trial proceedings.

Ford contends that the jurors' activities during trial constitute serious misconduct requiring reversal of the judgment below.[6] We agree with the basic premise that a jury's failure

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[6]It is curious that not one of the many participants in the trial other than the jurors themselves — i.e., the judge, attorneys, bailiff, shorthand reporters — noticed the jurors' distracting activities at any time during trial. Had the trial judge been informed of the misconduct at the time it had occurred, he would have had the opportunity to take corrective measures. Nevertheless, each of Ford's four attorneys filed affidavits disclaiming knowledge of the misconduct prior to the rendering of the verdict. (See Weathers v. Kaiser Foundation Hospitals, supra, 5 Cal.3d 98, 103.) They attribute their lack of knowledge of the misconduct to the elevated position of the jury box and the fact that the jurors often took notes during the course of the trial so that their downcast eyes and arm movements aroused no suspicion. It does not appear that Ford waived inattentiveness of the jurors as a ground for a new trial. (*Ibid.*)

to pay attention to the evidence presented at trial is a form of misconduct which will justify the granting of a new trial if shown to be prejudicial to the losing party. (See Code Civ. Proc., § 657, subd. 2.) The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations. Each juror should attempt to follow the trial proceedings and to evaluate the strengths and weaknesses of the evidence and arguments adduced by each side so that the jury's ultimate determinations of the factual issues presented to it may be based on the strongest foundation possible. Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled. (U.S. Const., 6th & 7th Amends.; Cal. Const, Art. I, § 16.)

Although implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention which granted a new trial on that ground. Many of the reported cases involve contradicted allegations that one or more jurors slept through part of a trial. Perhaps recognizing the soporific effect of many trials when viewed from a layman's perspective, these cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. (People v. Lee Yick (1922) 189 Cal. 599, 609-610; People v. Ung Sing (1915) 171 Cal. 83, 88-89; Callegari v. Maurer (1935) 4 Cal.App.2d 178, 184; People v. Roselle (1912) 20 Cal.App. 420, 423-424; State v. Cuevas (Iowa 1979) 281 N.W.2d 627, 632; State v. Pace (Utah 1974) 527 P.2d 658, 659; Maxwell v. State (Ala.App. 1946) 27 So.2d 804, 806; Powell v. Louisville & N.R. Co. (Ky.App. 1916) 189 S.W. 213, 214-215;

Continental Casualty Co. v. Semple (Ky.App. 1908) 112 S.W. 1122, 1123).

A number of decisions have considered claims of juror intoxication when presented with evidence that jurors imbibed alocholic beverages prior to hearing evidence or engaging in deliberations. The decisions have generally rejected claims of misconduct if satisfied that the consumption of liquor was not likely to have affected the indulgent jurors' capacity to competently perform their duties. (E.g., People v. Leary (1895) 105 Cal. 486, 491-496; People v. Deegan (1881) 88 Cal. 602, 604-607; People v. Manson (1976) 61 Cal.App.3d 102, 215; but cf. People v. Lee Chuck (1889) 78 Cal. 317, 330-339.)

A few other cases have rejected allegations of misconduct based upon the apparently inattentive demeanor of jurors during trial proceedings. In State v. Williams (Mo.App. 1978) 577 S.W.2d 59, 62, a juror was observed reading a newspaper during the giving of testimony. The trial judge had the paper taken away. The appellate court upheld the judge's decision not to declare a mistrial, noting that the complaining party had shown no demonstrable prejudice. In Ferman v. Estwing Manufacturing Company (Ill.App. 1975) 334 N.E.2d 171, 174-175, the appellate court overturned an order granting a new trial because a juror had appeared bored and inattentive during the trial. The court held that the party seeking a new trial must affirmatively establish prejudice resulting from juror inattention. Finally, in Wofford v. State (Okla.Crim.App. 1972) 494 P.2d 672, 674-675, the court found no error in the trial judge's refusal to dismiss a juror who yawned and cleaned his fingernails during the giving of instructions.

Turning to the facts of the present case, it appears that Ford has made a prima facie showing of improper conduct by certain jurors. No evidence contradicted the declarations

to the effect that some jurors engaged in distracting activities during the presentation of evidence at trial. It may reasonably be argued that the participating jurors did not at all times devote their full attention to the proceedings before them.

Plaintiffs rely on the counterdeclarations to rebut the inference that some jurors were inattentive during the trial. Those counterdeclarations in essence deny that the jurors' diverting activities prevented them from carefully listening to all the evidence put before them. Ford persuasively responds that Evidence Code section 1150, subdivision (a), renders the counterdeclarations inadmissible. That section provides: "Upon any inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

The primary authority interpreting this section is People v. Hutchinson (1969) 71 Cal.2d 342, in which we declared the rule as follows: "[Section 1150, subdivision (a), draws a] distinction between proof of over acts, objectively ascertainable, and proof of the subjective reasoning process of the individual juror, which can be neither corroborated nor disproved. . . ." We noted that section 1150 limits impeachment evidence to "proof of overt conduct, conditions, events, and statements. . . . This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influ-

ences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." (*Id.*, at pp. 349-350.)

Ford points out that the counterdeclarations relate to the subjective mental processes of the jurors: i.e., whether they were in fact able to pay full attention to the matters before them. Plaintiffs take the position that the counterdeclarations should be admissible to disprove the fact of misconduct. Each of these contentions has some logical support. On the one hand, the counterdeclarations plainly are an attempt to directly prove the subjective state of mind of individual jurors; therefore, they appear to run afoul of the rule of *Hutchinson*. On the other hand, the counterdeclarations do not relate to the *deliberative* mental processes of the jurors, but only to the issue whether the jurors physically paid attention to the evidence presented at trial.

In one previous case, we considered direct, subjective proof of the state of mind of a juror in rejecting allegations of misconduct due to sleepiness. In People v. Ung Sing, *supra*, 171 Cal. 83, 88-89, the defendant sought a new trial; he presented an affidavit alleging that one juror was asleep during some testimony. This court upheld the trial judge's denial of a new trial, relying on the accused juror's counteraffidavit stating that he was awake and heard all of the testimony.

Plaintiffs also place reliance on People v. Deegan, *supra*, 88 Cal. 602, 604-607. There the court—citing counteraffidavits of other jurors and persons present in the courtroom who did not perceive the juror to be intoxicated—rejected a claim of misconduct based on the drinking of alcohol by a juror prior to entering the courtroom. Although plaintiffs place substantial reliance on *Deegan*, we view that

case as standing only for the proposition that when objective, circumstantial proof of a juror's ability to deliberate is offered to show misconduct, that proof may be rebutted by similar objective proof to the contrary. (Cf. People v. Stokes (1894) 103 Cal. 193, 196-197.) *Ung Sing* is the only case cited which allowed direct, subjective proof of a juror's state of mind; that authority, however, was decided many years before the enactment of section 1150 and our explanatory decision in *Hutchinson*. It no longer accurately reflects the law in this state.

The rule of *Hutchinson* serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts.[7] It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.

We therefore decline to obfuscate the clear line drawn in *Hutchinson* between proof of objectively ascertainable facts and proof of the subjective mental processes of jurors. The counterdeclarations fall into the latter category and should not have been considered by the trial court in ruling

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[7]The policy of preserving the stability of jury verdicts is aptly expressed in the following passage: "To require trial courts to review declarations reciting purported thought processes of jurors is certain to produce a deleterious effect upon the finality of jury verdicts. I foresee the likelihood of all unsuccessful litigants, plaintiffs and defendants alike, canvassing jurors hereafter as a matter of policy, in the fond hope of discovering some forbidden element that may have inadvertently crept into jury discussions. Motions thereafter made on the basis of such discovery will seriously impede the expeditious administration of justice." (Krouse v. Graham (1977) 19 Cal.3d 59, 85 [conc. & dis. opn. of Mosk, J.]; see also People v. Romero (1982) 31 Cal.3d 685, 694-695.)

on the motion for a new trial.[8] The allegations contained in Ford's declarations therefore remain unrebutted. It must be concluded that by failing to fulfill their duty of attentiveness, the jurors committed misconduct.

This conclusion does not end our discussion, however, because a new trial is required only if it can be established that Ford was somehow prejudiced by the jurors' inatten-

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[8]Plaintiffs cites Krouse v. Graham, supra, 19 Cal.3d 59, 79-82, for the proposition that the trial court correctly admitted the counterdeclarations. In *Krouse*, defendant sought a new trial on the ground that the jurors had increased the verdict by an amount estimated to be paid by plaintiffs in legal fees. In support of his motion, defendant attempted to introduce declarations of jurors alleging "several jurors commented" on their belief that plaintiffs' counsel would be paid one-third of the total award. The declarations further stated that the jury "considered" this belief and "determined" the total award by adding an amount estimated to be plaintiffs' attorneys fees to the amount of damages. The trial court refused to admit the declarations, believing that they related to the mental processes of the jurors and were therefore excluded by Evidence Code section 1150, subdivision (a). We reasoned that "if the jurors in the present case actually discussed the subject of attorneys' fees and specifically agreed to increase the verdicts to include such fees, such discussion and agreement would appear to constitute matters objectively verifiable, subject to corroboration, and thus conduct which would lie within the scope of section 1150. . . . [¶] The declarations in question are inconclusive, however, and could be construed as conduct reflecting only the mental processes of the declarant jurors. . . . An assertion that a juror privately 'considered' a particular matter in arriving at his verdict, would seem to concern a juror's mental processes, and declarations regarding them, accordingly, would be inadmissible under section 1150." (*Id.* at pp. 80-81.) We ordered the trial court to admit the declarations and to reconsider the motion for a new trial. *Krouse* merely held that when juror declarations alleging misconduct are "inconclusive," i.e., do not clearly relate only to overt acts or only to subjective mental processes, the trial court should admit the declarations in their entirety and consider the admissible portions thereof in ruling on the motion for a new trial. However, the trial court must disregard inadmissible portions. Here, a similar ambiguity existed. Portions of counterdeclarations referred only to whether the jurors actually did pay attention to the trial proceedings; these portions constituted an impermissible inquiry into the jurors' mental processes. Other portions of the counterdeclarations referred to objectively verifiable facts. Therefore, the declarations were properly admitted in their entirety, even though portions thereof could not properly be relied on by the trial court in ruling on the motion for a new trial.

tiveness. Prejudice exists if, in the absence of proven misconduct, it is reasonably probable that a result more favorable to the complaining party would have been achieved.

On these facts, there is but the flimsiest evidence of actual prejudice to Ford. Only if we can infer from the bare fact that the jurors' diverting activities that they had prejudged the outcome of the case and closed their minds to further consideration of the evidence can it be said that actual prejudice occurred. Such an inference of partiality would be patently unwarranted on this record.

Nevertheless, Ford urges that we should presume prejudice from the fact of inattentiveness alone. In People v. Honeycutt (1977) 20 Cal.3d 150, 156, we stated: "It is well settled that a presumption of prejudice arises from any juror misconduct. . . ." However, the presumption may be rebutted by proof that no prejudice actually resulted." (See also People v. Pierce (1979) 24 Cal.3d 199, 205-209.)[9] The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type

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[9]Plaintiffs cite numerous cases which declare that the complaining party bears the burden of establishing prejudice resulting from misconduct. (E.g., City of Los Angeles v. Lowensohn (1976) 54 Cal.App.3d 625, 637; City of Pleasant Hill v. First Baptist Church (1969) 1 Cal.App.3d 384, 430; Philbrick v. Weinberger (1964) 228 Cal.App.2d 681, 688; Richards v. Gemco (1963) 217 Cal.App.2d 858, 863; Winnigar v. Bales (1961) 194 Cal.App.2d 273, 281; Watson v. Los Angeles Transit Lines (1958) 157 Cal.App.2d 112, 116; LaGue v. Delgaard (1956) 138 Cal.App.2d 346, 348; People v. Thomas (1952) 108 Cal.App.2d 832, 837.) Cases in other states universally require a showing of prejudice before overturning a jury verdict on grounds of juror inattentiveness. (E.g., International Ins. Co. v. Ballon (Fla.App. 1981) 403 So.2d 1071, 1075; see also cases cited in Annot., Inattentiveness of Juror From Sleepiness or Other Cause as Ground for Reversal or New Trial, 88 A.L.R.2d 1275, 1278-1279; 88 Am.Jur.2d, New Trial, § 95.) These authorities appear to be inconsistent with *Honeycutt's* presumption of prejudice. (See also Cal. Const., Art. VI, § 13.) On these facts, however, we need not reconsider the wisdom of the above-cited, broad language from *Honeycutt* because Ford does not prevail even if aided by the presumption.

likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred. The law thus recognizes the substantial barrier to proof of prejudice which section 1150 erects, and it seeks to lower that barrier somewhat.

Plaintiffs argue that the presumption of prejudice should not apply in civil cases. It is true that the presumption developed in criminal cases. But regardless of the rule's origin, civil litigants, like criminal defendants, have a constitutionally protected right to the complete consideration of their case by an impartial panel of jurors. (U.S. Const., 7th Amend.; Cal. Const., Art. I, § 16; Andrews v. County of Orange (1982) 130 Cal.App.3d 944, 953.) People v. Honeycutt, *supra*, 20 Cal.3d 150, 156, footnote 3, relied in part on civil cases applying a rebuttable presumption of prejudice. (See also Smith v. Covell (1980) 100 Cal.App.3d 947, 953-954.) Code of Civil Procedure section 475 does not compel a different result. That section states in pertinent part: "There shall be no presumption that error is prejudicial, or that injury was done if error is shown." We long ago rejected a rigid interpretation of section 475 in San Jose Ranch Co. v. San Jose Land & Water Co. (1899) 126 Cal. 322, 324-325. Furthermore, parallel provisions in the California Constitution and the Penal Code have not prevented us from applying the presumption in criminal cases. (See Cal. Const., Art. VI, § 13; Pen. Code, §§ 1258, 1404.) No principled distinction can be drawn between civil and criminal cases for purposes of the presumption of prejudice arising from juror misconduct.

However, the presumption is not conclusive; it may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination

of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. (In re Winchester (1960) 53 Cal.2d 528, 535; People v. Phillips (1981) 122 Cal.App.3d 69, 81; People v. Bullwinkle (1980) 105 Cal.App.3d 82, 91-92; Smith v. Covell, supra, 100 Cal.App.3d 947, 953-954; People v. Martinez (1978) 82 Cal.App.3d 1, 20-25.)[10] Some of the factors to be considered when determining whether the presumption is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.

Here the jurors engaged in essentially neutral, albeit distracting, activities at unspecified times during the presentation of evidence. There was overwhelming proof of liability against Ford and no substantial likelihood that actual prejudice may have resulted from the jurors' activities. It was not clear what type of evidence was being presented while the misconduct occurred or even which side's case was being presented. In sum, the showing of misconduct is rebutted by an examination of the record which reveals no substantial likelihood that Ford was given anything less than a full and fair consideration of its case by an impartial jury. The instances of misconduct demonstrated here do not rise to the level of evidence "of such a character as is likely to have influenced the verdict improperly." (Evid. Code,

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[10]On review of an order denying a new trial an appellate court has the obligation to review "the entire record, including the evidence, so as to make an independent determination whether the error was prejudicial." (Cal. Const., Art. VI, § 13; City of Los Angeles v. Decker (1977) 18 Cal.3d 860, 872; Clemens v. Regents of University of California (1971) 20 Cal.App.3d 356, 366; Deward v. Clough (1966) 245 Cal.App.2d 439, 445; Wilkinson v. Southern Pacific Co. (1964) 224 Cal.App.2d 478, 483-484.

§ 1150, subd. (a).) The trial court so found in its denial of a motion for new trial.

We take this opportunity to emphasize our unwillingness to allow the impeachment of jury verdicts on a bare showing that some jurors failed to conform their conduct to the ideal standard of utmost diligence in the performance of their duties. Even the most diligent juror may reach the end of his attention span at some point during a trial and allow his mind to wander temporarily from the matter at hand. We do not condone such conduct and trust that trial courts will be alert and take appropriate action if it occurs. But we recognize that this is especially likely to occur in such a complex and lengthy trial as the case at bar. Retrials are to be avoided unless necessitated by a more substantial dereliction of jurors' duties than was evident in this case. "Society has a manifest interest in avoiding needless retrials: they cause hardship to the litigants, delay the administration of justice, and result in social and economic waste." (Mercer v. Perez (1968) 68 Cal.2d 104, 113.) This plaintiff was seriously and permanently injured in 1970. He has prevailed in two lengthy jury trials, but for *twelve years* has received no recovery. Justice will not be served by a second reversal, yet another lengthy trial, to be followed in all likelihood by further appeals.

V.

Finally, Ford urges us to overturn the jury's compensatory award on the ground that it is excessive as a matter of law. Plaintiffs' expert projected the special damages as follows:

Past Medical Expenses	$ 70,719.00
Future Medical Expenses:	$ 333,000.00
Past Attendant Care	$ 77,000.00
Future Attendant Care	$ 789,000.00
Future Earnings Losses	$2,350,000.00
TOTAL	$3,619,000.00

The jury ultimately awarded a total of $7,500,000 in compensatory damages; the trial court remitted $1,650,000 of the award; and the compensatory portion of the ultimate judgment was $5,850,000.

Of course, we may overturn the award of damages only if the award is excessive as a matter of law or if after reviewing the record favorably to the judgment, we conclude that the award is so grossly disproportionate to the harm suffered as to raise the presumption that it resulted from passion or prejudice. (Bertero v. National General Corp. (1974) 13 Cal.3d 43, 64; Schroeder v. Auto Driveway Company (1974) 11 Cal.3d 908, 919.) Although the trial court may weigh the evidence and grant a new trial or order a remittitur if it finds the jury's award to be against the weight of the evidence, we are not so empowered.

Accepting Ford's assumption that the jury awarded the full amount projected by plaintiffs' expert and that the remainder of the award was for pain and suffering, there is some arguable merit to Ford's claim that the jury's award was excessive. The claims for future medical expenses and future attendant care may be somewhat exaggerated. Further, the claim for future earnings losses is based on the speculative assumption that James Hasson would fulfill his lifelong dream of becoming a medical doctor. The only tangible support for that assumption was the testimony of a college professor that James was "capable" of completing the necessary schooling, but James' scholastic history made that possibility dubious. At the time of the accident, he had completed only one year of college, earning less than a "B" average. Moreover, his high school grades and Scholastic Aptitude Test scores were unspectacular. On the other hand, it was reasonable to assume that James would have completed college and accordingly had a future earnings capacity with a present value of $868,000 or more. Fur-

thermore, the relevant figure for purposes of reviewing the excessiveness of damages is the total reflected in the postremittitur judgment. The trial court reduced the compensatory award by $1,650,000. In so doing, it brought the total amount of damages within reasonable limits and rendered it nonexcessive.

VI.

Plaintiffs have cross-appealed from the trial court's order reducing the amount of their compensatory award. The procedural history of the order is somewhat complicated: After the entry of a judgment against it, Ford moved for a new trial on numerous grounds. The court heard defendant's motion on December 1, 1978, indicating at the conclusion of argument that it intended to grant a conditional new trial on the ground of insufficiency of the evidence to support the compensatory award. (Code Civ. Proc., § 662.5.) The new trial was to concern the issue of damages only, and it would be avoided if plaintiffs consented to a reduction of the award by $1,650,000. However, the minute order erroneously stated that a conditional new trial was to be granted "on all issues." Subsequently, on December 11, plaintiffs' counsel sought to correct the error by way of a letter to the trial judge which suggested language for a new order conforming to the oral directions given by the judge at the conclusion of the new trial hear-ing. The judge adopted counsel's wording verbatim and entered the new order on December 12, nunc pro tunc as of December 1.

Plaintiffs now contend in their cross-appeal that both orders are invalid because neither contains an adequate explanation of the trial judge's reasons for ordering the conditional new trial. Of course, the requirement of a written specification of reasons for granting a new trial is well established. (Code Civ. Proc., § 657; Mercer v. Perez

(1968) 68 Cal.2d 104; Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal.3d 359, 365; Stevens v. Parke, Davis & Co. (1973) 9 Cal.3d 51, 59-63; La Manna v. Steward (1975) 13 Cal.3d 413, 417-425.) The rule serves the dual purposes of "encouraging careful deliberation by the trial court before ruling on a motion for new trial, and of making a record sufficiently precise to permit meaningful appellate review." (Scala v. Jerry Witt & Sons, Inc., supra, 3 Cal.3d at p. 363; see also Mercer v. Perez, supra, 68 Cal.2d at pp. 112-113.) The requirement applies equally to grants of conditional new trials. (Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 930-931.) It is plain that neither of the minute orders satisfied the requirement of a written specification of reasons. The first referred only to the "insufficiency of the evidence to justify the verdict"; the second granted a new trial "on the ground of excessive damages." Although the trial court's remarks upon granting the conditional new trial were more detailed, they obviously were not sufficient because they were oral, not written. (See Stevens v. Parke, Davis & Co., supra, 9 Cal.3d at pp. 62-63.)

Nevertheless, plaintiffs are estopped to complain of the trial court's error because they participated in its commission. (See Johnson v. Rich (1957) 150 Cal.App.2d 740, 747.) It would be anomalous to allow plaintiffs to base their appeal solely on the ground of the deficiency of an order which their counsel drafted. Under the unusual circumstances of this case — plaintiffs' counsel, who lost the motion for a new trial, drafted the adverse ruling said to be deficient — the trial court's order may stand even though it contains no written statement of reasons. Counsel cannot escape the effect of such invited error by pointing out that

the trial judge had an opportunity to enter a specification of reasons separately from the order.

The judgment is affirmed in all respects.

MOSK, J.

WE CONCUR:

BIRD, C.J.
NEWMAN, J.
BROUSSARD, J.
REYNOSO, J.
*BROWN, J.

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*Assigned by the Chairman of the Judicial Council.

DISSENTING OPINION BY RICHARDSON, J.

Hasson v. Ford Motor Company
L.A. 31527

I respectfully dissent.

The case presents an important issue involving the integrity of our jury system, namely, whether a verdict may stand despite proof that sitting jurors were permitted, during the presentation of evidence, to read books or work crossword puzzles. Through the sworn declarations of three named jurors (one of whom voted for plaintiff, one of whom voted for defendant, and one of whom did not vote) the following record was established:

Juror A declared that "over approximately one month . . . [juror D] was reading . . . a book in the jury box while witnesses and evidence were being presented," and that three other jurors (L, G and V) "over a period of several weeks during the trial were doing crossword puzzles in the jury box while witnesses and evidence were being presented"; *juror G* declared, "During the course of the trial I observed [juror L] in the jury box, had open written material or material with figures, not having to do with the trial, which she was working on or doing something with while testimony and evidence were being presented. On many occasions during the trial I saw [juror D] reading a book in the jury box while evidence and witnesses were being presented"; *juror W* declared that "During the course of trial I saw jurors [L, G and V] doing crossword puzzles in the jury box while witnesses and evidence were being presented. I observed that [juror D] while sitting in the jury box during court sessions was reading a book. Her reading continued intermittently over a period of many days."

The foregoing sworn declarations from *three* of the sitting jurors involved conduct of *five* of the twelve jurors. One

of the jurors charged with having worked the crossword puzzles did not deny that she had done so. The other four, in identical language, denied that "I was reading extraneous material or doing crossword puzzles *in any manner or to any extent, whereby I was not able to pay close attention to the testimony*." (Italics added.) The emphasized language is significant, containing an implicit acknowledgment that the misconduct occurred. Although the jurors asserted that the misconduct did not prevent them from following the testimony, this claim of extenuation is inadmissible under Evidence Code section 1150, subdivision (a).

The majority has frankly conceded that defendant "has made a prima facie showing of improper conduct by certain jurors. No evidence contradicted the declarations to the effect that some jurors engaged in distracting activities during the presentation of evidence at trial." (*Ante*, p. ___ [maj. opn., at p. 28].) The majority adds, further, that "It must be concluded that by failing to fulfill their duty of attentiveness, the jurors committed misconduct." (*Ante*, p. ___ [maj. opn., at p. 33].)

Fully acknowledging this misconduct, however, the majority nonetheless insists that there was "no substantial likelihood that actual prejudice may have resulted from the jurors' activities. It was not clear what type of evidence was being presented while the misconduct occurred or even which side's case was being presented." (*Ante*, p. ___ [maj. opn., at pp. 36-37].) With due respect, I think the majority errs. It does not matter what kind of evidence was being offered or who presented it during these periods of improper inattention. The majority of this court held just five years ago that, whether in a civil or criminal case, "*It is well settled that a presumption of prejudice arises from any jury misconduct*. In an early case we said: 'For, *when misconduct of jurors is shown, it is presumed to be injurious to defen-*

dant, unless the contrary appears . . . . [¶] Juror misconduct has occurred in several forms requiring reversal when prejudice is *presumed* in the absence of evidence to rebut the presumption.' " (People v. Honeycutt (1977) 20 Cal.3d 150, 156, italics added.)

The present majority ignores this long established presumption of prejudice by purporting to rebut the *presumption* because defendant has failed to show *actual* prejudice! However, as the majority itself has observed, the presumption of prejudice was intended specifically to assist those litigants "who are *unable* to establish by a preponderance of the evidence that actual prejudice occurred." (*Ante*, p. ___ [maj. opn., at p. 34], italics added.) Thus, the majority casts the burden of showing a "substantial likelihood" of actual prejudice upon the very party whose inability to prove such prejudice created the presumption in its favor. This reasoning cannot be the law and it surely has not been our previous position. For example, quite recently in a criminal context, People v. Pierce (1979) 24 Cal.3d 199, we said "jury misconduct raises a presumption of prejudice; and unless the *prosecution* rebuts that presumption by proof that *no* prejudice actually resulted, the defendant is entitled to a new trial. [Citations.]" (P. 207, italics added.) Similarly, in the case before us when jury misconduct is established, the burden is upon the *plaintiff* to demonstrate that no prejudice resulted from the misconduct. It is *not* the task of *defendant*, who has the benefit of the presumption, to show prejudice.

Nor is the misconduct trivial or inconsequential. A defendant's right to a fair jury trial in civil litigation is of both federal and state *constitutional* significance. (Byram v. Superior Court (1977) 74 Cal.App.3d 648, 654; Clemens v. Regents of University of California (1971) 20 Cal.App.3d

356, 360.) We should not countenance such a complete erosion of a constitutional command.

The fact, of course, if it be a fact, that the evidence against defendant on the issue of *liability* was, in the majority's words, "overwhelming," does not detract one whit from defendant's right to the jurors' careful independent evaluation of the *damage* aspect of the case. There was certainly no "overwhelming proof" of plaintiff's entitlement to $11,570,719, the amount of the jury's verdict, which the trial court itself voluntarily reduced. In my view, this is an exceedingly large verdict, and the jurors' admitted inattention to the flow of the evidence may very well have occurred during the presentation of the damage phase of the case. We do not know. Moreover, my conclusion is not changed by defendant's inability to identify and match the particular periods of the jurors' distraction with the specific evidentiary presentation by one party or the other. That, of course, is not a critical point because oral or documentary evidence favorable to a defendant may be received during a plaintiff's presentation, and vice versa.

How, in fairness, is it possible for defendant which did not know of the misconduct, nor did anyone else outside of the jury box apparently, to prove that the jury's inattention injured it, either as to the liability or damage issues in this case? The jury's misconduct here was real, it was substantial and it is admitted. It is not an answer to say that because no one saw the misconduct, not judge, counsel, bailiffs or anyone else, therefore it must not have occurred. The record beyond doubt establishes that in fact it *did* occur and the majority freely acknowledges that it did. The fact that the jury misconduct may have been surreptitious does not dilute the force of the majority's conclusion that, "by failing to fulfill their duty of attentiveness, the jurors committed misconduct." (*Ante*, p. ___ [maj. opn. at p. 33].) This mis-

conduct was pervasive, involving *five* of the twelve jurors including the "forewoman." It continued over an extended period of time, variously described as "approximately a one-month period," or "over a period of several weeks," or "on many occasions," or "intermittently over a period of many days." It occurred "*while witnesses and evidence were being presented.*" (Italics added.) The misconduct was not the momentary dozing of a single juror in an isolated incident. Rather, it involved almost half the jury in frequent, prolonged, intentional mental activity of a type that was diverting and that required thought and contemplation. I respectfully suggest that there are very few jurors, or anyone else to my knowledge, who can simultaneously read a book or work a crossword puzzle while following attentively the testimony in a courtroom. Such activities, in my opinion, were wholly incompatible with a juror's duties and, with full respect to my esteemed colleagues, we delude ourselves if we think otherwise. The misconduct poisoned the verdict.

Thus, I am unable to square the degree of admitted jury misconduct in this record with what I have always believed was the sworn duty of a juror to "well and truly try the matter at issue." (Code Civ. Proc., § 604.) This duty surely entails giving undivided attention to the evidence and court proceedings whether the trial lasts three hours, three weeks or three months. Litigants are entitled to no less.

Accordingly, I concur in the conclusion of the unanimous Court of Appeal herein that "A crossword-puzzle working juror attempting to ascertain the proper word has a closed mind, or at minimum, an interrupted attention span. Similarly a novel-reading juror cannot concentrate on both the flow of the plot and the flow of the testimony. Such inattention implies prejudgment of the case which is misconduct. [¶] Nothing admissible appears in the record herein to rebut the presumption of prejudice which arises from such

juror misconduct. The inescapable conclusion is that the parties did not have 12 unbiased, impartial jurors."

Believing that we should not approve as a standard for California litigants the jury conduct in this case, I would reverse the judgment.

RICHARDSON, J.

HASSON, a Minor etc., et al. v. FORD MOTOR CO.
L.A. 31527

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Superior Court: Los Angeles

Superior Court No.: C-989 523

Trial Judge: Hon. James G. Kolts

APPENDIX B.

Order of Supreme Court of California Denying Rehearing.

Order Due November 15, 1982.

Order Denying Rehearing. L.A. No. 31527.

In the Supreme Court of the State of California In Bank.

James M. Hasson, a minor, etc., et al. v. Ford Motor Company.

Filed: November 15, 1982.

Newman, J., and Kaus, J., did not participate.

Appellant's petition for rehearing DENIED.

Richardson, J., is of the opinion that the petition should be granted.

/s/ Bird
Chief Justice

APPENDIX C.

Order of Supreme Court of California Denying Motion to Stay Issuance of Remittitur.

L.A. No. 31527.

In the Supreme Court of the State of California In Bank.

James M. Hasson, a minor, etc., et al. v. Ford Motor Company.

Filed: November 15, 1982.

Newman, J., and Kaus, J., did not participate.

The motion to stay issuance of the remittitur, considered by the court in bank, is DENIED.

/s/ Bird
Chief Justice

APPENDIX D.

Remittitur.

In the Supreme Court of the State of California.

James M. Hasson, a Minor, etc. et al., Plaintiffs and Appellants, vs. Ford Motor Company, Defendant and Appellant. L.A. No. 31527.

Appeal County LOS ANGELES. Superior Court No. C 989 523.

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the* judgment *of the Superior Court* of the *County of* Los Angeles *in the above-entitled cause*, is *hereby* affirmed.

Plaintiffs and Appellants HASSON shall recover its costs on APPEAL. Defendant and Appellant FORD MOTOR CO. shall recover its costs on CROSS-APPEAL.

I LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the* 16th *day of* SEPTEMBER, *1*982

WITNESS *my hand and the seal of the Court*, this 15th *day of* NOVEMBER, *1*982

LAURENCE P. GILL
Clerk

By R. GILMORE
Deputy

APPENDIX E.

Notice of Appeal to the Supreme Court of the United States.

L.A. 31527
2nd Civil No. 57952
(Super. Ct. No. C989523)

In the Supreme Court of the State of California.

James M. Hasson, a Minor, by and through his Guardian ad Litem Jack M. Hasson, individually, Plaintiffs and Appellants, v. Ford Motor Company, a corporation, Defendant and Appellants.

Appeal from the Superior Court of Los Angeles County.

Hon. James G. Kolts, Judge.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ford Motor Company, the defendant and appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, rendered in this action on September 16, 1982, affirming the judgment for plaintiffs in all respects.

Rehearing was denied in this case by the Supreme Court of the State of California on November 15, 1982, a petition for rehearing having been timely filed in that court by Ford Motor Company on October 1, 1982.

This appeal is taken pursuant to 28 United States Code section 1257(2).

Dated: November 24, 1982.

Respectfully submitted,

McCUTCHEN, BLACK, VERLEGER & SHEA
WINCHESTER COOLEY III
HUGH C. GARDNER III

By /s/ Winchester Cooley III
WINCHESTER COOLEY III

Attorneys for Appellant
FORD MOTOR COMPANY

APPENDIX F.

Opinion of Court of Appeal of the State of California in Hasson v. Ford Motor Company.

Court of Appeal of the State of California, Second Appellate District, Division Five.

James M. Hasson, a Minor, by and through his Guardian ad Litem Jack M. Hasson, and Jack M. Hasson Individually, Plaintiffs, Respondents, and Cross-Appellants, v. Ford Motor Company, Defendant, Appellant, and Cross-Respondent. 2d Civ. No. 57952. (Super. Ct. No. C 989 523).

Filed: November 25, 1981.

APPEAL from a judgment and order of the Superior Court of Los Angeles County. James G. Kolts, Judge. Reversed and Remanded.

McCutchen, Black, Verleger, & Shea, Winchester Cooley III, Hugh C. Gardner III, for Appellant.

Harney & Moore, David M. Harney; Horvitz & Greines, Ellis J. Horvitz; Gerald H. B. Kane, Jr., for Respondents.

Defendant appeals from a judgment awarding plaintiffs $5,206,657 in compensatory damages and $4,000,000 in punitive damage and from an order denying a motion for judgment notwithstanding the verdict.

Plaintiffs appeal from the conditional new trial order granting a new trial on the ground of excessive damages only. We reverse the judgment and the conditional new trial order and remand to the trial court for a new trial on all issues because of juror misconduct.

BACKGROUND

The genesis of this case is an automobile accident which occurred July 17, 1970, when a 1966 Continental automobile manufactured by Ford Motor Company suffered a brake failure while travelling in the Hollywood Hills and crashed into a fountain and a wall, destroying the car and

leaving the driver severely disabled. The driver, plaintiff James M. Hasson, was at that time, 19 years; and his father, Jack M. Hasson, as his son's guardian ad litem, filed against Ford Motor Company on behalf of his son and himself.

The first trial ended in a verdict in 1973 for plaintiff; this was reversed in 1977 (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530).

This appeal arises from the second trial in 1978 at which time the jury returned a verdict for plaintiffs in the sum of seven and one half million dollars in actual damages and four million punitive damages. A motion for new trial by Ford Motor Company was granted on the basis of excessive damages unless plaintiff consented to a reduction of $1,650.000. Plaintiff consented to reduction. The appeal and cross-appeal followed.

Ford Motor Company contends eight categories of error warrant a reversal of the judgment. Plaintiffs contend that damages are not excessive and urge reinstatement of original jury verdict.

Except for the contentions of prejudicial juror misconduct and excessive damages, other issues raised herein involve substantiality of the evidence. Because there was prejudicial juror misconduct necessitating a new trial on all issues, the court does not address the other contentions because resolution of such issues is not necessary to a final determination of the case. (Code Civ. Proc., § 43.)

DISCUSSION

Voir Dire Concealment.

The contention of defendant that there is prejudicial error because of "concealment" of information by jurors *during voir dire* is without merit. The juror who failed to divulge she was being sued by her creditors and who subsequently filed bankruptcy did not harm defendant's case in any man-

ner whatsoever. The juror who did not reveal he had lost a 15-year old son because of an automobile accident which caused brain damage was not asked specifically whether any member of his family had suffered brain injuries in an automobile accident. It is difficult, therefore, to see that intentionally he was "concealing" bias, or that his non-disclosure was prejudicial.

Juror Misconduct.

However, the contention by defendant of various acts of improper conduct by jurors *during* the trial is a basis for serious and concerned scrutiny.

Juror declarations filed by defendant in conjunction with the motion for a new trial referred to (1) statements allegedly made by other jurors that indicated a bias against defendant *before* deliberations: (2) statements allegedly made by one juror regarding a visit to the Continental dealer, a previous defendant herein; (3) reading by several jurors of an article from the Los Angeles Times about another Ford Motor Company case, allegedly brought into the courtroom by another juror; (4) reading by a juror of *A Night in Byzantium*; and (5) observation of three jurors working crossword puzzles during the taking of evidence.

Juror counter-declarations filed by plaintiffs deny the following: any statements of bias made by a juror before deliberations; any statements regarding a visit by a juror to the dealership during the trial; and that *if* the article from the Los Angeles Times were brought in, which jurors, if any, read it, was not known. However, there was no denial of working crossword puzzles and no denial of reading a book by the "accused" jurors. Each juror insisted that no bias resulted from such activity, in the following language:

> "I specifically deny that I did not pay attention to the testimony of witnesses and evidence being pre-

> sented during the trial or that I was reading extraneous material or doing crossword puzzles in any maner or to any extent, whereby I was not able to pay close attention to the testimony of each and every witness and the presentation of all evidence in open court. . . ."

Evidence Code section 1150(a) permits juror declarations or affidavits to be used for the purpose of showing

> ". . . statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent or dissent from the verdict or concerning the mental processes by which it was determined."

Any portion of the counter-declarations signed by the jurors which referred to the effect, or non-effect, of external conduct on the decision-making process of said jury is simply inadmissible and cannot be used as objective evidence (*People v. Hall* (1980) 108 Cal.App.3d 373, and should have been stricken by the trial judge at the hearing on the motion for new trial and judgment notwithstanding the verdict.

In *Smith v. Covell* (1980) 100 Cal.App.3d 947 (citing at page 953, *People v. Honeycutt*, (1977) 20 Cal.3d 150, 156, 141 Cal.Rptr. 698, 570 P.2d 1050), the court states:

> " '[A] presumption of prejudice arises from any juror misconduct [which] presumption may be rebutted by proof that no prejudice actually resulted.' . . ."

In *Deward v. Clough* (1966) 245 Cal.App.2d 439 at page 444, the court states:

> ". . . the right to a trial by jury in an action such as this is jurisdictional. [Citations.] . . . And 'the right to unbiased and unprejudiced jurors is an inseparable

and inalienable part of the right to a trial by jury. . . .' [Citations.] *The guarantee is to 12 impartial jurors*. . . ." (Original in double italics; italics added.)

A crossword-puzzle working juror attempting to ascertain the proper word has a closed mind, or at minimum, an interrupted attention span. Similarly a novel-reading juror cannot concentrate on both the flow of the plot and the flow of the testimony. Such inattention implies prejudgment of the case, which is misconduct.

Nothing admissible appears in the record herein to rebut the presumption of prejudice which arises from such juror misconduct. The inescapable conclusion is that the parties did not have 12 unbiased, impartial jurors.

The judgment and new trial order both must be reversed for a new trial on all issues by an unbiased jury.

CERTIFIED FOR PUBLICATION.

RALPH, J.*

We concur:

ASHBY, Acting P.J.

HASTINGS, J.

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*Assigned by the Chairperson of the Judicial Council.